United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

~~73-2363~~

74-1846

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

RUBEN FELICIANO,

Appellant.

Docket No. ~~75-2363~~

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BRIEF FOR APPELLANT PURSUANT TO ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Question Presented

Whether there are any non-frivolous issues which can be presented on appeal to this Court.

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert J. Ward) rendered on June 12, 1974 convicting appellant of bribery of a federal agent and of giving a federal officer an unlawful gratuity (18 U.S.C. §§201(b); 201(f); 2) and sentencing him to a three year period of probation.

The Legal Aid Society, Federal Defender Services United was continued as counsel on appeal.

Statement of Facts

Appellant and Benigno Ramirez were indicted for bribery and giving an officer an unlawful gratuity. Ramirez pleaded guilty and appellant proceeded to trial alone.

The primary witness for the prosectuion was Joseph McGrath, an internal revenue agent. In April, 1971, Mr. McGrath was assigned to handle the income tax returns for 1969 and 1970 of Benigno Ramirez (13). In September, I971, during the court of his study of Ramirez' finances, McGrath discovered a $23,000 bank account (21) which had not been revealed by Ramirez (20). In December, 1971, McGrath prepared the documents proposing adjustments in the tax returns and stating that an additional $13,000 was owed to the government for the

years 1969 and 1970 (23). An agreement was signed by the taxpayer to the figures assessed and the case was closed (24).

Approximately a year later* a claim for a refund of $12,000 was made by Mr. Ramirez (26) and was signed by appellant (27). On October 12, 1972, McGrath received a telephone call from appellant saying he had a power of attorney from Ramirez to represent him in tax matters (28). Appellant stated that the $23,000 should not be taxable because it was money from Puerto Rico (30). Appellant set up a meeting with McGrath, but failed to appear. Later, Appellant called McGrath and asked for more time to secure proof of the source of the money. On January 19, 1973, at a meeting with Ramirez, appellant and McGrath, Appellant showed McGrath affidavits (33). McGrath refused to accept them stating they were self-serving statements (33). McGrath stated he told appellant that the claim needed substantiation, that none had been presented, that the case was old and that the boss wanted the case closed. McGrath agreed to give appellant until January 23, to file substantiation (35).

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*The record indicates this was October, 1971, but this must be incorrect and mean 1972.

On January 29, 1973, appellant called and told McGrath that the income was from gambling. McGrath told appellant that the money was taxable if it came from gambling (35). Appellant requested that McGrath come to his office for a meeting to solve the matter. McGrath told appellant that he had the right to appeal. Appellant was persistent in his request for a meeting and one was set up for February 1, 1973 in Brooklyn.

McGrath then notified the inspection unit of Internal Revenue Service and reported the events.

McGrath called appellant on January 29, 1973 and the conversation was recorded (Transcript is government exhibit 13). McGrath stated he could not see what the meeting could accomplish and when appellant insisted it take place, the site was changed to Manhattan.

One February 1, 1973, McGrath, equipped with a recording machine went to the meeting. At the meeting, appellant requested that the amount of money assessed as owed in the two years be reduced (42). (The transcript of a recording of the meeting was government exhibit 14.) In the course of the conversation part of which took place between appellant and Ramirez in Spanish, McGrath was handed a note that said if the assessment was cut to $6,100 McGrath would

get $1,000 (44). McGrath made changes in the tax form and the $1,000 was given to him in an envelope (47).

At the end of the trial, the defense sought dismissal of the charges on ground of entrapment. The Court stated the issue was one that should be presented by the jury and denied the motion (125).

In his charge to the jurors, the judge instructed:

> The question of entrapment involves two issues and should be considered by you in two deliberate stages. It is important that you realize this during your deliberations.
>
> The first issue for you to consider, which you heard argued by counsel, is whether the defendant was induced to commit the crime by anyone acting for the Government, in this case by Agent McGrath. It is an essential feature of the defense of entrapment that the idea or design of committing the crime originate with a law enforcement officer rather than with a defendant. So the first question you must ask is: Who initiated the criminal transaction involved in this case? Did McGrath initiate the criminal transaction in this case? Did he propose or suggest it? Or did Mr. Feliciano initiate the criminal transaction involved in this case? Did he propose or suggest it?

I instruct you that the defendant must adduce some evidence that McGrath initiated the illegal conduct and thereby himself induced the defendant to commit the offense.

In short, it is necessary for the defendant to have adduced some evidence that McGrath took the first step to set in motion the criminal activity charged in the indictment. If you do not find such inducement there can be no entrapment.

If you are satisfied by the Government's proof as to the lack of inducement, then there can be no entrapment as a matter of law.

If, however, you are satisfied from a review of the record that the defendant has produced some evidence that the Government initiated the criminal transaction, then you must consider the second issue, that is, did the Government prove beyond a reasonable doubt that the inducement was not the cause of the crime, but rather that the defendant was ready and willing to commit the crime?

You must pass upon this second question because the defense of entrapment is not simply that the Government initiated the criminal transaction. You will recall that

I explained that the defense of entrapment is based on the policy that law enforcement agencies cannot manufacture crime by leading innocent people into commiting a crime. This policy creates a distinction between the unwary innocent and the unwary criminal.

Accordingly, even if you do find, pursuant to my instructions, that Agent McGrath initiated the criminal transactions charged in the indictment, there can nevertheless be no entrapment if the defendant was, in fact, an unwary criminal as distinguished from an unwary innocent. That is, when I say unwary criminal, that is one who was ready and willing to seize upon the opportunity afforded by the Government to commit the crime.

Thus, if a person has a readiness and willingness to break the law, th mere fact that a Government agent provides a favorable opportunity for the commission of a crime is no defense. In such a case the Government has certainly not led an innocent person astray but has only provided the means by which the defendant may realize his already pre-existing purpose. In such a situation the inducement by the Government which brought about the actual offense does no more than provide the defendant with what appears to be a favorable or timely

> or convenient time, place, opening or opportunity for the criminal conduct in which this defendant was willing to engage.
>
> There are several ways the Government can show that the defendant was ready and willing. One of these is that the defendant had an already-formed design to commit the crime for which he is charged in this case.
>
> Another way is for the Government to show the defendant's willingness to commit the crime with which he is charged and this can be evidenced by his ready response to the inducement.
>
> You may consider both these ways as far as they bear on the defendant's being ready and willing to commit the crimes charged in the indictment.
>
> 183 - 186.

There were no exceptions to the charge. The jury deliberated and convicted the appellant.

Possible Issue on Appeal

The judge properly submitted the issue of entrapment to the jurors.

It might be argued that it was error for the judge to charge that, "the defendant must adduce some evidence

that McGrath initiated the initial conduct...." for the defendant might well be able to show inducement from the Government's own evidence. However, in this case the evidence of propensity was overwhelming and thus the issue of inducement became irrelevant.

CONCLUSION

For the above-stated reasons, The Legal Aid Society, Federal Defender Services Unit, sh ould be permitted to withdraw as counsel for appellant for purposes of this appeal.

Respectfully submitted,

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